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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 520

IN THE MATTER OF THE LIQUIDATION
of
NATIONAL SURETY COMPANY

Claim of WILLIAM F. LAUGHLIN, as Administrator de bonis non of the Estate of Wesley Cooper, Deceased,
Claim No. C. B. 2262.

WILLIAM F. LAUGHLIN, etc.,
Petitioner,
(Claimant-Appellant below),

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of National Surety Company,
Respondent,
(Petitioner-Respondent below).

MOTION OF DEPARTMENT OF BANKING, STATE OF NEBRASKA, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WENDELL P. BARKER,
Counsel for Department of
Banking, State of Nebraska.

WENDELL P. BARKER,
MORRIS AMCHAN,
of Counsel.

INDEX

PAGE

I. Statement of Matter Involved 2

II. The effect of the decision below 4

III. Reasons relied on for granting the writ 6

CASES CITED

Mutual Res. F. Life Ass'n v. Phelps, 190 U. S. 147 6

Nierbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165 6

Washington, ex rel. Bond & Goodwin v. Superior Court, 289 U. S. 361 6

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TO THE HONORABLE CHARLES EVANS HUGHES,
CHIEF JUSTICE OF THE UNITED STATES,
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the Department of Banking of the State of Nebraska, respectfully shows:

1. That your petitioner is an executive arm of the Government of the State of Nebraska and is empowered by Nebraska statutes to act as official or statutory receiver of delinquent banking institutions.

2. Your petitioner as such statutory receiver is also a claimant in the liquidation proceedings of the National Surety Company, which company is being liquidated in the State of New York pursuant to the Insurance Laws of that state.

3. Your petitioner asks leave to file a brief as *amicus curiae* in support of the petition for a writ of certiorari to review a decision of the New York Court of Appeals dated May 28, 1940 (reported in 283 N. Y. 68) affirming a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (fols. 178-183) which affirmed without opinion an order of the Special Term of the Supreme Court, New York County (fols. 10-14) affirming the disallowance of a claim by a referee (fols. 142-162).

I.

Statement of Matter Involved.

On June 1, 1934 the Superintendent of Insurance of the State of New York, pursuant to an order of the Supreme Court of that State, took possession of and became vested with legal title to the property of the National Surety Company and proceeded to liquidate its affairs in accordance with the Insurance Laws of the State (fols. 116-160).

The order of liquidation dissolved the company and directed all claimants to file their claims with the Liquidator in New York not later than April 1, 1935. The claimant, a citizen of Mississippi, filed sworn proofs of claim within the period prescribed by the liquidation order, but in-

voked his local forum, the Courts of the State of Mississippi, for the purpose of having the merits of his claim passed upon.

After the filing of the claim, claimant instituted a suit in the State of Mississippi against the National Surety Company setting forth that the action was on a bond executed and delivered in the State of Mississippi by the National Surety Company (fols. 106-108).

Process was served on the insurance company pursuant to the laws of Mississippi governing the admission of foreign insurance companies, which provided in substance that a foreign insurance company prior to engaging in business in Mississippi, be required to irrevocably appoint the Commissioner of Insurance of the State of Mississippi its agent for the service of process (fol. 149).

The summons was served on the Commissioner of Insurance of Mississippi pursuant to Mississippi law who delivered the summons to the Liquidator of the National Surety Company in New York City (fol. 29).

The National Surety Company defaulted in appearance and answer, with the result that judgment by default was entered against it (fols. 70-84).

The Liquidator and the Courts of the State of New York have declined to give full faith and credit to that judgment, holding that the State of Mississippi could exercise no jurisdiction over a foreign insurance company after the company had been dissolved in the state of its domicile, notwithstanding that the company had previously transacted the business of insurance in Mississippi by permission of the State. The Court below further held that the power of attorney filed by the National Surety Company, appointing the Commissioner of Insurance of the State of Mississippi its agent to receive process on its behalf (which power of attorney was pursuant to Mississippi statute, to continue so long as there were outstanding liabilities in the State of Mississippi), ineffective, and could

furnish no basis for *in personam* jurisdiction over the company in an action commenced after the dissolution of the company by a Mississipppi resident on a contract executed in the State of Mississippi.

II.

The effect of the decision below.

The decision of the Court of Appeals has an unsettled effect on the law relative to the qualifying of foreign insurance corporations in the several states. It seems to declare that the law of the chartering state of a corporation follows the corporation everywhere, and that when another state seeks to impose conditions upon such foreign corporations as a requisite to authority to transact business in such state, that such conditions are subordinate to the laws of the State of the corporation's domicile.

The State of Nebraska has (as other states have) required foreign insurance companies as a condition to transacting business in the State to file a written appointment of the Director of Insurance as its lawful agent upon whom process may be served. The purpose of such statutes obviously is to protect Nebraska citizens who may do business with such foreign insurers by subjecting the company to the jurisdiction of Nebraska Courts with respect to business transactions entered into with Nebraska citizens. In furtherance of that purpose, Nebraska (along with other states) has provided in its statutes (§ 44-407, Compiled Statutes of Nebraska as amended) that:

> "Such appointment (of the Director of Insurance as agent to receive process) and authority shall continue as long as any certificate of membership, policy, or liability remains outstanding against the company, corporation or association, in this state. The dissolution of any foreign insurance company shall not take

away or impair the right of any person to commence an action in this state against such companies or associations or their statutory successors as agents thereof and procure service upon such companies or their statutory successors as herein provided for any liability previously incurred."

Nebraska, had supposed, that to protect its citizens in its business dealings with foreign insurers, it had the power to require the foreign insurer as a condition of transacting its business to submit to its local forum. Nebraska had supposed, that by exacting such condition from a foreign insurer, that its citizens would not be required to seek the State of the corporation's domicile to protect their rights.

We are told now, by the Court below, that when a New York insurance company that had been transacting an interstate business, is dissolved, not only must claims be filed in New York, but that Mississippi and Nebraska citizens must come to New York to prove their claims. They may not, we are told, invoke the aid of their local forums for proof of their claims against the insolvent insurer.

In the liquidation of an interstate insurer, the statutory domiciliary liquidator acquires legal title to the property of the company wherever situated and if there are not sufficient local assets to satisfy the claims of local creditors, non-resident creditors would be compelled under the decision of the court below, to come to the state where the domiciliary liquidation proceeding is taking place in order to prove their claims. They may not if the decision below is sustained, invoke the aid of their local forums to prove their claims. We concede, of course, that in the liquidation of an interstate insurer the *filing* of a claim as distinguished from its proof may be required, as respects non-resident creditors, to be made in the jurisdiction of the domiciliary statutory liquidator. Thus is the liqui-

dator apprised of the existence and nature of the claims asserted. The further requirement, however, that proof of such claims is exclusively for the domiciliary jurisdiction is, we submit, erroneous.

This decision may compel each state, in order to protect its own citizens, to require foreign insurance companies to leave on deposit securities which would be available to local creditors in the event of insolvency of the company.

Heretofore it was thought that by requiring a power of attorney to be filed, a sufficient basis for personal jurisdiction over the corporation had been established and that in case of insolvency, a non-resident creditor could invoke his local forum to prove his claim just as he could invoke his local forum for purposes of suit while the foreign insurer was a going concern.

The foregoing demonstrates that the decision below has left the law with respect to qualifying of foreign insurers in an unsettled state which this court should clarify.

III.

Reasons relied on for granting the writ.

1. The Court of Appeals of the State of New York has decided a federal question of substance which is not in accord with applicable decisions of this Court as set forth in

Washington, ex rel. Bond & Goodwin v. *Superior Court,* 289 U. S. 361;

Mutual Res. F. Life Ass'n v. *Phelps,* 190 U. S. 147;

Nierbo Co. v. *Bethlehem Shipbuilding Corp.,* 308 U. S. 165.

2. The Court of Appeals of the State of New York has decided a federal question of substance which is of public

importance in that it leaves unsettled the law relating to the power of a state to impose conditions as to the qualifications of a foreign insurer to transact business in the several states, which should be settled by this court.

WHEREFORE, your Petitioner prays that a writ of certiorari be issued out of this Court as prayed for by petitioner-claimant, *Laughlin,* and that leave be granted to your petitioner to file a brief *amicus curiae* to the end that the order and judgment of the Court of Appeals be reversed by this Court and such other and further relief be granted as to this Court may seem just and proper, and your petitioner will ever pray.

Dated: New York City, November 4th, 1940.

DEPARTMENT OF BANKING,
STATE OF NEBRASKA,

By: WENDELL P. BARKER,
Counsel for Petitioner.

WENDELL P. BARKER,
MORRIS AMCHAN,
of Counsel.

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